Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA,

Appellant,

v.

UNITED STATES OF AMERICA and
WILLIAM B. SAXBE, ATTORNEY GENERAL, and
CURTIS HOLT, SR. *et al.* and
CRUSADE FOR VOTERS OF RICHMOND, *et. al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

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City of Richmond v. County of Chesterfield, Circuit Court of Chesterfield County, July 1, 1969, *writ of error refused sub nom.*, Deerbourne Civic and Recreation Association v. City of Richmond, 210 Va. li (1970), *cert. denied*, 397 U.S. 1038 .... 10, 55

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C. Bain, *Annexation in Virginia*, Univ. Press of Virginia 1966 54

1B J. Moore, Federal Practice (2d ed. 1965)

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¶0.441[2] 28, 29

T. Muller and G. Dawson, *The Impact of Annexation on City Finances: A Case Study In Richmond, Virginia*, The Urban Institute, May, 1973. 58

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1960 United States Censuses of Population and Houses: Census Tracts, Richmond Virginia, Final Report PHC(1) - 126, Table 2 44

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OPINION BELOW

The opinion of the special three-judge District Court for the District of Columbia is reported at 376 F. Supp. 1344 (D.D.C. 1974). Copies of the judgment and the

opinion of the District Court and the Findings of Fact and the Conclusions of Law of the Special Master appointed by that court are found in Appendices A, B and C of the Jurisdictional Statement.

JURISDICTION

The judgment of the District Court was entered on June 6, 1974. Notice of appeal was filed in that Court on July 15, 1974. The Jurisdictional Statement was filed on August 29, 1974, and probable jurisdiction was noted on December 16, 1974. The jurisdiction of this Court to review this decision by direct appeal is conferred by 42 U.S.C. §1973c (1970).

STATUTE INVOLVED

Section 5 of the Voting Rights Act, as amended by Act of June 22, 1970, 84 Stat. 315, 42 U.S.C. §1973c (1970), is set forth in Appendix D to the Jurisdictional Statement. This case also involves the application of the Fifteenth Amendment.

QUESTIONS PRESENTED

1. Whether the District Court below misapplied and misconstrued the principles enunciated in *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, and then engrafted new

requirements, not intended by Congress, onto the Voting Rights Act of 1965, by refusing to approve Appellant's request for declaratory judgment and holding that, if impermissible *purpose* is involved in an annexation, an "extra burden" rests on Appellant beyond that required to cure any prohibited *effect*.

2. Whether the District Court below erred in finding that the Voting Rights Act encompasses requirements so unique as to enable that Court to find an impermissible purpose in the annexation, in direct conflict with the decision of the Court of Appeals in *Holt v. City of Richmond*, 334 F. Supp. 228 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. 931 (*Holt I*), which, on the identical evidence and record, found no such purpose in a suit brought under the Fifteenth Amendment.

3. Whether the District Court below exceeded the jurisdiction granted by the Voting Rights Act in (1) asserting jurisdiction "to enforce the direct command of Section 5 by enjoining the annexation in order that councilmanic elections within Richmond's old boundaries can be immediately held", and then (2) suggesting that the District Court in Virginia, in the Intervenor's separate suit, might determine a remedy.

4. Whether the District Court below properly required the economic and administrative benefits of annexation to be established in order to render a declaratory judgment that the voting changes resulting from annexation, as amended, did not have the purpose and effect of abridging the right to vote on account of race or color.

5. Whether approval of Appellant's 9-Ward Plan by the Attorney General, and his determination that the proposed change does not have a racially discriminatory purpose or effect, may be set aside or given no weight by the District Court below.

6. Whether a determination by the Court of Appeals that no violation of the Fifteenth Amendment had resulted from the annexation was *res judicata* as to the issues in a suit under Section 5 of the Voting Rights Act involving substantially the same parties.

7. Whether the decision in *Allen v. State Board of Elections*, 393 U.S. 544, requires the disapproval of an annexation which creates an incidental dilution of the black vote but which results from a legitimate and necessary governmental action, not addressed to voting or voting standards, practices or procedures.

STATEMENT

I.

INTRODUCTION

The appellant, City of Richmond, Virginia, (hereinafter referred to as "the City") is a political subdivision of the Commonwealth of Virginia with respect to which provisions of Section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. 1973c are in effect.

Accordingly, voting changes resulting from a 1969 annexation by the City were submitted to the United

States Attorney General for approval on numerous occasions. Upon failing to reach accord with the Attorney General, this case was filed in the Court below. After the suit was filed, the City and Attorney General agreed upon a ward plan for electing city councilmen and asked the Court below to enter a declaratory judgment under Section 5 of the Voting Rights Act. The Court below refused to give any deference to the Attorney General, prevailing case law or the Voting Rights Act in denying the declaratory judgment and this appeal followed.

II

GENERAL BACKGROUND

The City of Richmond, like all cities in Virginia, is independent and not a part of the counties surrounding it. Its boundaries may be changed only by judicial decree, after an adversary proceeding against the county from which the land area is sought or by consolidation of the city and county after the majority of those voting in a referendum in each political subdivision has separately agreed thereto. Under these unique circumstances of independence from surrounding local jurisdictions, Richmond has successfully annexed territory from surrounding counties ten times in its history, the last time prior to 1969 being 1942.[1]

As the City of Richmond developed in the 20th Century, and after the 1942 annexation, the need for

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[1] See Tabulation for Plate 3, ACX A-2, ATR 153. The annexations as shown on said plate 3 are as follows:

DATE	POPULATION AFTER ANNEXATION	AREA ANNEXED (SQ. MILES)	TOTAL AREA AFTER ANNEXATION (SQ. MILES)
1742[1]	250	0.20	0.20
1769	574	0.54	0.74
1780	684	0.34	1.08
1793	4,384	0.41	1.49
1810	9,785	0.91	2.40
1867	38,710	2.50	4.90
1892	83,000	0.38	5.28
1906	105,000	4.45	9.73
1910	127,628	1.02	10.75
1914	145,244	12.21	22.96
1942	208,039	16.93	39.89

Note:

[1]Original City. Source: A Master Plan, Richmond, Virginia, 1946.

revision in City government became apparent which resulted in a new charter for the City granted in 1948 (Acts of Assembly for 1948, Chapter 116). Under this new charter the city council consisted of one body which replaced the previous bicameral city council. The City under this charter elected its councilmen at large following the predominant view that local government perfoms better when governed by representatives elected at large with a concern for the welfare of the whole City. In addition, the City of Richmond was administered under the council-manager form of government.

During the 1950's various studies showed that for Richmond to remain a vital, prosperous City, expansion of boundaries was a necessity.[2] Discussions were held with epresentatives of the governing bodies of Henrico Couny which bounds the City generally on the East, North and West, and Chesterfield County which adjoins the Cty generally to the South. The City and Henrico Couny entered into negotiations seeking the consolidation of the two political subdivisions under the provisions of Title 15.1, Chapter 24, of the Code of Virginia 1950, as amended, culminating in an agreement for onsolidation between the two governing bodies. Therefter, said agreement was submitted on December 12, 961, to referendum in both political subdivisions in accordance with law. The voters of the City

[2]References to the record herein are abbreviated as follows: "MTR" for the transcript of the hearing before the Master; "HTR" for the transcript from *Holt I*; "ATR" for the transcript from the annexation case. References to exhibits from the respective records will be preceded by "M", "H", or "A". The City's exhibits in each record are designated "CX". The Joint Appendix is abbreviated JA; the Appendix to the Jurisdictional Statement is abbreviated JS. Other references are described fully.

approved the consolidation plan, but the voters in Henrico County disapproved the plan which therefore failed. *Holt v. City of Richmond*, 459 F.2d 1093, 1094 (4th Cir. 1972), *cert. denied*, 408 U.S. 931.

III.

THE ANNEXATION CASE

Promptly thereafter, on December 26, 1961, the city council of the City, in accordance with the provisions of the Virginia annexation statutes (Section 15.1-1032 *et seq*. Ch. 25, Code of Va. of 1950, as amended) adopted two annexation ordinances requesting the convening of a three-judge annexation court and seeking from said court the annexation of approximately 150 square miles of Henrico County and approximately 51 square miles of Chesterfield County, respectively. After numerous delays in pretrial procedures, including proceedings in the Supreme Court of Appeals of Virginia, the annexation suit against Henrico County resulted in a decree awarding the City approximately 16 square miles of land area which contained 42,690 white persons and 660 non-white persons with financial obligations imposed upon the City of approximately $55 million. City council, in March, 1965, concluded by ordinance that it was not in the best interests of the City to accept the annexation award because the heavy financial burden imposed by the court upon the City was out of proportion to the amount of territory awarded and, with the consent of

the Court, the Henrico case was dismissed. (*Holt v. City of Richmond, supra*, at 1095).

Thereafter, the annexation suit against Chesterfield County, which had been allowed to remain dormant on the docket of the Circuit Court of Chesterfield County pending the proceedings in the Henrico County suit, was brought on for hearing. After various delays, the case came on for a full hearing in May and June of 1969. The decree of the annexation court dated July 12, 1969, awarded approximately 23 square miles of land area adjacent to the City located in Chesterfield County. The population as of 1968 of Chesterfield County prior to annexation was 102,633 white and 9,845 non-white persons. The pre-annexation population of the City as of 1970 was 202,359 of which 103,377 were black and 98,982 were non-black persons. The annexation added to the City, according to the 1970 United States Census figures, 47,072 people, of which 1,389 were black and 45,683 were non-black persons. The post-annexation population of the City was, therefore, 249,431, of which 104,766 were black and 144,665 were non-black. (MCX 1, 2, 3, MTR 210, 233.)

The Annexation Court specifically found that "the evidence overwhelmingly convinces us of the necessity for and expediency of some annexation . . . . " (J.A. 42) The Annexation Court adopted a compromise agreement backed by the City and Chesterfield County. The compromise was entered into by the County "to promote a better spirit of cooperation and friendliness between the City and County." (J.A. 46). The City

entered into the compromise essentially because the Henrico annexation award by the court had been so financially unacceptable that the City was fearful of another such unpalatable award (HTR 362, Vol. II, and 455, Vol. III, of four volumes).

Appeals were instituted by numerous intervenors from Chesterfield County which were denied by the Supreme Court of Appeals of Virginia. Thereafter, a motion for stay of the effective date of annexation fixed by the Virginia statutes, to-wit, January 1, 1970, and a petition for certiorari were filed by said intervenors in the Supreme Court of the United States. The motion for stay was denied separately by Justices Douglas, Marshall and Brennan, prior to January 1, 1970, the effective date of annexation. On April 20, 1970, the petition for certiorari was denied by this Court. *City of Richmond v. County of Chesterfield*, 208 Va. 278, 156 S.E.2d 586, *cert. denied sub. nom. Deerbourne Civic & Recreation Ass'n v. Richmond*, 397 U.S. 1038.

On January 1, 1970, the City, pursuant to the annexation decree, took jurisdiction over the area awarded to it from Chesterfield County by said Annexation Court in accordance with the provision of the annexation statutes, and has continued to operate, manage and supervise the area since that date (MTR 50).

IV.

HOLT DECISIONS

A. Holt I

On February 24, 1971, a class action was instituted in the United States District Court for the Eastern District of Virginia in the name of Curtis Holt, Sr. It alleged primarily that the voting rights of the plaintiff class guaranteed by the Fifteenth Amendment had been violated by the change resulting from the annexation. The District Court, on November 23, 1971, ruled that the annexation before it had the purpose of abridging the right to vote on account of race or color in violation of the Fifteenth Amendment. Though the Court found that annexation in some form was "inevitable", it also found that the compromise agreement resulting in this annexation was improper. The Court, therefore, ordered a new election of city councilmen. Seven were elected at large by the former City residents, and two elected primarily from the newly annexed area. This election order was stayed on December 8, 1971, by the United States Court of Appeals for the Fourth Circuit. On appeal, by both the City and Holt, the Court of Appeals ruled that "Under the circumstances, no violation of any Fifteenth Amendment right was worked by the annexation, effected, as it was, by the decree of the state court," thus reversing the lower Court's decision. A Writ of Certiorari was denied by this Court. *Holt v. City of Richmond*, 334 F. Supp. 228 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093, 1100 (4th Cir. 1972), *cert. denied*, 408 U.S. 931. (Hereinafter referred to as *Holt I*).

B. Holt II

On December 9, 1971, Curtis Holt, Sr., instituted another suit in the United States District Court for the Eastern District of Virginia (*Holt II*) (Case No. C.A. 695-71-R). He alleged, *inter alia*, that the City had not complied with Section 5 of the Voting Rights Act of 1965, and that, accordingly, the annexation of territory from Chesterfield County was invalid. A three-judge court was convened pursuant to 28 U.S.C. Section 2284 (1970). The plaintiff in that action subsequently sought an injunction against the election officials of the City of Richmond, to restrain them from holding the election of city council members, scheduled under Virginia law for the first Tuesday in May, 1972. The three-judge court refused to enjoin the election. Upon application to the Chief Justice of the United States, the election was stayed on April 24, 1972, until further order. 406 U.S. 903. The trial of that case was continued on motion of both the City and the plaintiff as discussed *infra*, at note 5. A subsequent Order was entered by the three-judge court on October 12, 1972, which enjoined any elections of City officials. The case was continued pending the lower Court's decision herein and the case was again continued pending final determination of the instant case by this Court.

V.

PROCEEDINGS PURSUANT TO VOTING RIGHTS ACT

Immediately after the decision on January 14, 1971, by the Supreme Court of the United States in *Perkins v. Matthews*, 400 U.S. 379, the City Attorney, on behalf of the City, sought approval initially on January 28, 1971, from the Attorney General, of the annexation retaining the at-large voting procedure.[3] At that time no guidelines had been established by the Department of Justice to seek such approval.[4] By letter of February 16, 1971, Jerris Leonard, Assistant Attorney General, replied in part:

> We are considering the materials you submitted with your January 28th letter and will determine promptly whether any additional materials are necessary for the Attorney General to make his determination and be in further contact with you.

The City submitted additional material on March 5, 1971, as requested by subsequent letter from the Attorney General. Thereafter on May 7, 1971, the Attorney General declined to approve the voting change resulting from the annexation, in light of the at-large voting procedure (MTR 50, 53, Ex. B to Complaint, J.A. 23), and referred the City to the lower court's decision in *Chavis v. Whitcomb*, 305 F. Supp. 1364

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[3]The letter of January 28, 1971, in part stated:

"Would you please advise me whether or not the above proceedings come within the Voting Rights Act of 1965, and if so, what steps should be followed in order to secure your approval." Ex. A to Complaint, J. A. 20.

[4]Such regulations were published on September 10, 1971, in 36 Fed. Reg. No. 176.

(S.D. Ind. 1969), subsequently reversed in 403 U.S. 124.

Thereafter, the Attorney General was asked by letter from the City Attorney dated August 2, 1971, to reconsider his objection in light of the reversal of *Chavis*. The Attorney General by letter of September 30, 1971, declined to lift his objection, again suggesting, as he had done previously, that the adoption of "single-member, *non-racially* drawn councilmanic districts" was one means of minimizing the racial effect (Ex. D to Complaint J.A. 31). [Emphasis added]

Again, upon final decision of the *Holt I* case by the Fourth Circuit Court of Appeals and denial of a Writ of Certiorari by this Court, 408 U.S. 931, the City Attorney asked the Attorney General by letter of July 5, 1972 to reconsider his objection. The basis for this request for reconsideration was, as the parties in the *Holt I* and *Holt II* cases had agreed,[5] that the Voting

[5] In *Holt II* the City requested and obtained with the concurrence of counsel for the plaintiff Holt a continuance of that case until the Fourth Circuit Court of Appeals had decided *Holt I*. In the hearing to obtain that continuance, counsel for Holt had agreed that the Voting Rights Act was only a codification and procedural implementation of the Fifteenth Amendment. Counsel for Holt stated in part as to why he brought a Fifteenth Amendment case prior to the Voting Rights action:

> "And we were dealing with very, very extensive issues and very basic constitutional freedoms and felt that the Fifteenth Amendment way to go, while there were two avenues of attack, each independent from the other, as I believe this court has ruled, and I believe the Fourth Circuit has ruled, while we still had two alternative methods of attack that the Fifteenth would bring us to the basic gut issue a lot faster. That is what we did where we went."

Rights Act codified Fifteenth Amendment rights; therefore the *Holt I* decision in favor of the City should have erased all objections under the Voting Rights Act.

Having received no reply from the Attorney General, on August 25, 1972, the City filed this lawsuit, pursuant to the Act, seeking approval of the annexation with at-large voting. The complaint for declaratory judgment was founded on the fact that the annexation and at-large procedure had been judicially approved as not being a violation of the Fifteenth Amendment in the *Holt I* case (MTR 57).

After the City had filed this suit, the Attorney General declined to reconsider his position because this case was pending.

While this suit was thus pending, this Court affirmed *Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1973), *aff'd* 410 U.S. 962. The lower Court in that case held that a similar annexation by the City of Petersburg, in the context of at-large elections, abridged the right to vote of the black population. That Court held that the annexation could be approved on the condition that "modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted, *i.e.*, that the plaintiff shift from an at-large to a ward system of electing its city councilmen." 354 F. Supp. at 1031.

Also, the City Attorney did not contact the Attorney General again until *Holt I* was ended since he believed that case would answer the Attorney General's objections. *See*, note1, Legal Memorandum of Plaintiff, filed July 2, 1973, in the Court below.

At a preliminary hearing on March 8, 1973, the Court below asked counsel for Plaintiff whether *Petersburg* was similar to this case as the Court believed it was. Counsel replied in the affirmative. As in *Petersburg*, the *effect* of the annexation is dilution of black voting strength. (Tr. March 8, 1973 hearing, at p. 3.) After that, assuming *Petersburg* controlled, the City Attorney advised the city council of the effect of the Petersburg decision, and advised that the City should submit to the court a 9-Ward plan to meet the requirement set out in *Petersburg* (MTR 58, 98).

After a public hearing, a 9-Ward plan was developed and discussions were held from time to time with counsel in the Department of Justice. Changes were suggested by the Department of Justice and approved by the City in order to make the plan acceptable under Section 5 of the Voting Rights Act. The resulting final Plan, MCX15, J.A. 161, is the plan presented by the City and the Attorney General to the Court below (MTR 58-60, 114, 216, 300-01).

Thereafter, a proposed consent judgment was presented to the Court by the City and the Attorney General. Since the Voting Rights Act gives the Attorney General authority to approve covered voting changes administratively and since the Attorney General is given deference in such matters (*Petersburg v. United States, supra*, at 1031), the City expected the consent judgment to be entered. Nevertheless, after a hearing on the motion for consent judgment in which the Attorney General and City asked that their ward plan be approved, the case was referred to a Special Master.

VI.

DECISION OF COURT BELOW

After a hearing the Special Master recommended de-annexation to the District Court based upon his finding that this annexation was the result of an impermissible purpose. To reach a basis for this recommendation, the Master made findings of fact based primarily on evidence stipulated into the record from the *Holt I* case which had been declared by the Fourth Circuit Court of Appeals not to prove bad purpose.

The District Court, though not ordering de-annexation, adopted the findings of the Master and ruled that an "extra burden" must be overcome to purge the bad purpose for this annexation and thus ignored the decision in *Holt I* and *Petersburg*. The District Court below further held that no economic or financial administrative benefits for the City could be ascribed to the annexation even though the necessity and expediency of annexation had been established in the state annexation court and in *Holt I*, both of which records are part of the record in this case. Moreover, the City does not believe economic or administrative conditions to be an issue under the Voting Rights Act.

The Court denied the petition for declaratory judgment and took no affirmative action, whereupon this appeal was filed.

SUMMARY OF ARGUMENT

A. Following *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, while the City's case was pending in the District Court, the City, in consultation with the Department of Justice, approved a 9-Ward Plan, "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters."

Prior to annexation, blacks accounted for 44.8% of the voting age population. The ratio of voting age population to the nine council seats was 4.03 seats. Annexation reduced the black voting age population to 37.3% of the total. The City's 9-Ward Plan guarantees the black citizens 4 seats on the City Council, corresponding exactly to the ratio of black voting age population to council seats prior to annexation. Voting age population is the outside limit on the number of citizens who can register and vote, and thus is the necessary measure of voting strength. The City's plan, as approved by the Attorney General, therefore effectively eliminates any dilution caused by annexation.

B. The District Court found that the annexation was accomplished for an impermissible purpose, and that, therefore "an extra burden rests on that city to purge itself of discriminatory taint. . . ." (J.S. App. B., p. 20) That Court held that, to so "purge" itself, the City would have to show (1) that the ward plan not only reduced, but effectively eliminated dilution of black voting power, and (2) that the City had some objectively verifiable, legitimate purpose for annexation.

1. The 9-Ward Plan not only eliminates any dilution of black voting strength, it actually enhances that strength over and above what it was prior to annexation. Then, with the at-large election system then in effect, and assuming bloc voting by race, black citizens could not have elected any black candidates to the council. The 9-Ward Plan was adopted to assure black citizens of at least 4 seats. Any dilution is thus eliminated. Any "extra burden" beyond this necessitates more than elimination of dilution to the maximum extent reasonably possible, the *Petersburg* standard, and, indeed, more than effective elimination of dilution. The Court below has, in effect, rewritten the Act. Nowhere in the Act, the legislative history, or the interpretive decisions is such a requirement of an "extra burden" ever implied.

Further, nowhere in the Act or legislative history is it suggested that two distinct violations as to "purpose" and "effect" could occur. These terms are only means to the same end. If a change in voting practices has an impermissible effect, it is also prohibited. No different burden or sanction is required to "cure" the purpose of an impermissible change. The remedy is the same - a fairly drawn plan meeting constitutional requirements. *City of Petersburg v. United States*, 354 F. Supp. at 1030-31.

2. The Court below adopted the Master's finding that the City "failed to establish any counterbalancing economic or administrative benefits of the annexation." (J.S. App. B., p.20). The Court below, by this finding, has totally ignored the record. The record of the

annexation case was a part of the *Holt I* record, all stipulated into evidence herein.

Even though the record is replete with such evidence from the *Holt I* record, such findings are irrelevant to the issue before the Court. The issue herein is whether voting changes caused by the annexation, modified by the 9-Ward Plan, resulted in an impermissible dilution of black voting strength. This is a question of constitutional rights, upon which economic issues have no bearing. *Watson v. Memphis*, 373 U.S. 526, 537-38.

The annexation record is completely concerned with economic and administrative benefits of the annexation, as required by Virginia law. The Virginia Court found the necessity and expediency for the annexation; without proof it could not have done so. The annexation has been approved by the Virginia Court, and, in *Holt I*, by the Fourth Circuit, on the same record as was before the Court below. The District Court's finding simply ignores this portion of the record.

C. The record in *Holt I* was adopted by the Master, and is relied on by the Court below. That record is the only evidence regarding "purpose" in this case. The Court below, upon this evidence, found the annexation to be "tainted" with an illegal purpose.

1. The Court in *Holt I* did not find any illegal purpose in the annexation itself. It found this annexation to be "inevitable" and "necessary". 334 F. Supp. at 234, 236. The finding of the *Holt* Court was concerned with the compromise agreement and the timing of that agreement as to affect the 1970 election.

2. The Court of Appeals for the Fourth Circuit reversed the District Court to the extent that the purpose of the compromise was found to be impermissible. That judgment should be given *res judicata* and collateral estoppel effect herein. The question of purpose should not have been redetermined by the three-judge District Court.

D. Any annexation of surrounding territory would, in fact, dilute the black vote in the City, as recognized in *Holt I*, 334 F. Supp. at 234. An increase of voters resulting from a legitimate annexation cannot be considered "substantive discrimination". *Allen v. State Board of Elections*, 393 U.S. 544, 559.

Perkins v. Matthews, 400 U.S. 379, 389, held that Section 5 was designed to cover changes having a "potential for racial discrimination in voting". This is a holding only as to *coverage*, and does not answer the substantive question of whether the change was for the purpose or had the effect of abridging the right to vote. If it did, virtually every change in city land areas by annexation would be inhibited. The substantive question is the same under Section 5 as under the Fifteenth Amendment - whether the purpose and effect of the change is to abridge or deny the right to vote on the basis of race or color. Here, the effect upon black voting strength was incidental to achieving different, legitimate governmental goals attainable only through annexation. While the change may be covered by Section 5, *Allen* and *Perkins* should not be applied to prohibit such annexation.

ARGUMENT

I.

THE QUESTION OF PURPOSE HEREIN HAS BEEN SETTLED.

A. The District Court Found An Impermissible Annexation Purpose On The Same Record Upon Which The Fourth Circuit Court Of Appeals Previously Had Reached An Opposite Conclusion.

The incidental and unintended effect of the City of Richmond's annexation of Chesterfield County, the dilution of black voting strength, is conceded here. *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962, disposed of the notion that impermissible effects of an annexation could not be cured, thereby locking the City into its original boundaries, by holding that such was not the intent of Congress in enacting the Voting Rights Act. 354 F. Supp. at 1030.

The District Court below, however, found an impermissible purpose in the annexation. This holding is in direct conflict with the decision of the Court of Appeals in *Holt v. City of Richmond*, 459 F.2d 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. 931, *rev'g* 334 F. Supp. 228 (E.D. Va. 1971). (*Holt I*).

The Court below made substantially the same findings, based on the same evidence, as were made by the District Court in *Holt I*. The findings of the *Holt I*

District Court on impermissible purpose were reversed by the Court of Appeals, which held, on the same evidence before the Court below in the instant case, that no impermissible purpose existed.

In deciding the issue of motivation, or purpose, Chief Judge Haynsworth, writing for the Court of Appeals said:

> "What is attacked is the Council's failure to reject the annexation award and the informal participation of some councilmen in an agreement which hastened the conclusion of the tediously prolonged litigation."
> 459 F.2d at 1099.

That Court further stated:

> "There is no finding, and the record would not support such a finding, that any councilman who did, or did not do, anything in 1969 was not motivated by the same purposes which led to the institution of the annexation proceeding in 1961 and recurrent attempts to reach a settlement agreement in the intervening years. If some impermissible reason crept into the minds of some members of Richmond's Council in 1969, that cannot negate all of the compelling reasons which led them and their predecessors in office to press on the same course in earlier years." *Id.* at 1099.

The District Court in *Holt I* had concluded that "the Councilmanic Election of 1970 is tainted and new elections are called for." 334 F. Supp. at 239. This conclusion was reversed. To the extent that the *Holt I* District Court found motivation or purpose for the compromise agreement to be impermissible, that was overruled by the Court of Appeals.

The Court of Appeals stated: "Under the circumstances, no violation of any Fifteenth Amendment right was worked by the annexation, effected, as it was, by the decree of the state court." 459 F.2d at 1100.

The identical record and evidence, from *Holt I*, were before the Court below in the instant case. In the instant case the only hearing on the merits, before the Special Master, related to the 9-Ward Plan and the elimination of dilution of black voting strength. All evidence regarding purpose of the annexation was stipulated into the record from the *Holt I* record.

The determination of the *Holt I* Court was held by the Court below, however, not to be binding, despite the identical subject matter and the parties. The only evidentiary hearing on the merits of this question was before the *Holt I* District Court. On this record alone, the Court below found that impermissible purpose did exist (J.S. App. B., p. 16, fn. 43), whereas the Fourth Circuit reached the opposite conclusion in the Fifteenth Amendment case.

In refusing to follow the determination of the Court of Appeals in *Holt I*, the Court below in effect held that Section 5 requires a different standard and different interpretation of the same evidence than does the Fifteenth Amendment.

While *Holt I* was brought under the Fifteenth Amendment, the instant case was instituted pursuant to the Voting Rights Act. This Act was passed to provide a concise, speedy, procedural remedy for violations of rights guaranteed by the Fifteenth Amendment. The purpose of the Act has been stated many times:

> "The Act was drafted to make the Fifteenth Amendment finally a reality for all citizens." *Allen v. Board of Elections*, 393 U.S. 544, 556. *See also, South Carolina v. Katzenbach*, 383 U.S. 301 and *Perkins v. Matthews*, 400 U.S. 379.

The Court below thus cannot reach a conclusion as to the significance of the same evidence in a Section 5 case different from that in a Fifteenth Amendment case. They are one and the same, and must be the same for Section 5 to have an underlying Constitutional foundation. *South Carolina v. Katzenbach, supra* at 326-327.

B. The Findings Of The Holt I District Court Do Not Reach Invalidation Of the Purpose Of The Annexation.

The Court of Appeals for the Fourth Circuit, in reversing the District Court, in *Holt v. Richmond, supra*, summarized the District Court's holding thusly:

> "...the District Court did not invalidate the decree of the annexation court. Instead it sought to provide some compensation for the timing of the decree by ordering districting of voters...." 459 F.2d at 1097.

The District Court in *Holt I* thus actually found, in part, that:

> "Annexation itself was inevitable as evidenced by the State Court's decree. The fact that the proposed compromise terms were those adopted by the Circuit Court of Chesterfield County does

not strike this Court as being unusual." 334 F. Supp. at 236.

And, again, the District Court found:

"The Court is satisfied from the evidence that the initial proceedings against each county were not motivated by any effort to dilute, deny or disenfranchise the vote of Negro citizens." *Id.* at 231.

Further, the District Court found that annexation was necessary and that the City would ultimately prevail in the annexation proceeding, quoting the State Court to that effect:

" 'The evidence overwhelmingly convinces us of the necessity for and the expediency of some annexation.' " *Id.* at 234, note 3.

And, the District Court further said:

"The Court is cognizant that any compromise agreement in the then pending suit and/or judicial decree resulting in annexation would have diluted the Negro vote." *Id.* at 234.

And, thus the District Court found:

"The wrong to the plaintiff class was as to the Councilmanic Election of 1970. Ultimately there would have been a dilution of the class' voting strength. Annexation of any portion of Chesterfield County would have accomplished this – but only because of the race of the members of the class was it accomplished prematurely." *Id.* at 237.

In characterizing the lawsuit, the District Court speaking of the Plaintiff class, said:

"True they seek in addition a declaration that the annexation award is null and void and without effect. The Court's findings however, *go primarily to that portion of the annexation proceedings which embodied in the compromise agreement a compact to dilute for the Councilmanic Election of 1970 the vote of the plaintiffs* solely because of their race." *Id.* at 238. (emphasis added).

Thus, the finding of the *Holt I* District Court was concerned with the compromise agreement, and the timing of that agreement as to affect the 1970 election. (That holding was, of course, reversed by the Court of Appeals.) The District Court did not find the annexation to be "tainted" by any wrongful purpose, but only that the 1970 election, was so "tainted". 334 F. Supp. at 239. The two factors, the agreement and the timing thereof, are inseparable as the basis of that Court's conclusions.

These findings do not, however, constitute findings of unlawful purpose of the annexation, *per se*. The annexation was found, in fact, to be necessary and properly motivated.

The impermissible purpose found by the *Holt I* District Court, therefore, concerned only the compromise agreement, which shortened the annexation proceedings, and effected the 1970 elections. This can only mean that if the proceedings had run their course, annexation would have been ordered (it was "inevitable", 334 F. Supp. at 236), and no impermissible purpose as to any element would have been found. The election of 1970 is over and cannot now be undone. The clock cannot be turned back to order a re-election at that time. The next election, however, and future

elections, are at issue here. It is these elections, by the expanded electorate, with which we are concerned. The 9-Ward Plan is the determining factor here.

C. The Decision As To Purpose In *Holt I* Is Binding Herein Under The Principles of *Res Judicata* And Collateral Estoppel.

Chief Justice Warren stated regarding *res judicata* and collateral estoppel:

> ". . . under the doctrine of *res judicata*, a judgment 'on the merits in a prior suit involving' the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand such judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawler v. National Screen Service Corp.* 349 U.S. 322. *See also* Justice Harlan's Opinion in *Hoag v. New Jersey*, 356 U.S. 464.

Volume 1B J. Moore, *Federal Practice* ¶0.441[2] (2d ed. 1965) states the following regarding *res judicata* and collateral estoppel:

> "Courts and writers have used the term 'res judicata' to refer generally to the doctrine of judicial finality, including collateral estoppel." *Id.* at 3775.
>
> "As we have seen, application of the doctrine of res judicata necessitates an identity of causes of action, while the invocation of collateral estoppel does not. Each doctrine on the other hand requires that, as a general rule both parties to the subsequent litigation must be bound by the prior judgment. The essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction . . . ." *Id.* at 3777.

According to traditional *res judicata* notions, a member of a class is considered to be a party by representation, and will be bound to the same extent as an actual party. But, in order to be deemed a party by representation, a class member must be represented in such a way that his rights are protected. 7A Wright & Miller, *Federal Practice and Procedure*, Civil § 1789.

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." *Hansberry v. Lee*, 311 U.S. 32, 42-43.

Holt I was a class action by black voters residing within the City, as found by the District Court. Crusade for Voters and Holt, Intervenors herein, represent the same class. In *Holt I*, the Court found that the class was adequately represented (see Order filed November

23, 1971, by the *Holt I* District Court). In the *Holt* case, officers of the Crusade testified on behalf of Plaintiff class, and therefore obviously had notice of, and participated in, the lawsuit. The findings, and the decision of the Court of Appeals, are binding under the principles of collateral estoppel on these parties who are the only objectors to the proposed 9-Ward Plan. The United States, and the Attorney General, do not oppose Plaintiff's position, as evidenced by their position herein.

When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment provides the key to its continued form as *res judicata* and collateral estoppel. A judgment that has been reversed on appeal is deprived of all conclusive effect, as *res judicata* and collateral estoppel. The appellate court's judgment is then entitled to *res judicata* and collateral estoppel effect, when it becomes final, as is the case with *Holt I.* 1B J. Moore, Federal Practice ¶0.416 [2] (2d ed. 1965); Restatement, *Judgments* § § 68, 69.

The doctrine of collateral estoppel is applicable to questions of law, as well as to questions of fact. However, "it is not applied to questions of law unless the successive actions not only involve the same questions of law, but also arise out of the same transaction or involve the same subject matter". Scott, *Collateral Estoppel by Judgment,* 56 Harv.L.Rev. 1, 10 (1942). The usual statement of the rule is that where an issue of fact, or in limited situations, an issue of law "essential to the judgment is actually litigated and

determined by a valid and final judgment, the determination is conclusive between the parties and their privies." Note, *Developments in the Law - Res Judicata,* 65 Harv.L.Rev. 820, 840 (1952), citing Restatement, *Judgments,* § 68(2).

In the instant case, the issue now being discussed, whether the purpose of the annexation was for the purpose of denying or abridging blacks the right to vote on account of race or color, was the very issue decided in *Holt I.* The subject matter is the very same subject matter as was involved in *Holt I.* Therefore, the question of law, or of mixed law and fact if that should be the case, has been decided by the Court of Appeals, whose judgment is final. There was no such purpose.

The Court of Appeals held:

> "For perfectly valid reasons, Richmond's elected representatives had sought annexation since 1961. Those reasons were compelling, so much so that, as the District Court found, annexation was 'inevitable.' For those reasons, and for those reasons alone, settlement negotiations had been undertaken, and the court had encouraged and prompted them. If they were not fruitful earlier, there is no suggestion anywhere that the legitimate reasons for compromise did not wax in strength as the litigation extended into its eighth year. There is no finding, and the record would not support such a finding, that any councilman who did, or did not do, anything in 1969 was not motivated by the same purposes which led to the institution of the annexation proceeding in 1961 and recurrent attempts to reach a settlement agreement in the intervening years." 459 F.2d at 1099.

This conclusion is binding upon the Defendant-Intervenor parties herein, and should not be now retried in this action. The annexation has been determined as fairly intended to accomplish a legitimate governmental purpose, with nothing therein to indicate a racial purpose. Insofar as the question of "purpose" is involved, both the facts and legal issues have been determined. This conclusion brings us full circle to the situation of *Petersburg, i.e.*, determination of the effect of the annexation, as modified by the 9-Ward Plan.

The effect is conceded, the expansion of the at-large voting system, diluting black voting power. The 9-Ward Plan eliminates that dilution completely. The requirement of the Court below of an "extra burden" because of impermissible purpose is invalid, as discussed *infra.*

II.

THE VOTING RIGHTS ACT ONLY CODIFIES AND ESTABLISHES A PROCEDURAL REMEDY FOR IMPLEMENTATION OF THE FIFTEENTH AMENDMENT AND THEREFORE INCIDENTAL VOTING CHANGES, WHICH DO NOT ABRIDGE OR DENY THE RIGHT TO VOTE, RESULTING FROM A LEGITIMATE ANNEXATION DO NOT VIOLATE THE ACT.

Section 5 is simply a means of implementing the commands of the Fifteenth Amendment to the Constitution as the title of the act states, "An act to enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes." (Public Law 89-110; 79 Stat. 437). In *South Carolina v. Katzenbach*, 383 U.S. 301, 327, this Court stated: "Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965."[6] The Amendment and the Act both speak of "abridging or denying" the right to vote. These words connote some affirmative act directed at voting discrimination or infringement, not just incidental or collateral voting changes resulting from a legitimate legislative act.

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[6]In *Allen v. Board of Elections*, 393 U.S. 544, 556, the Court stated:

> "The Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens. *South Carolina v. Katzenbach, supra,* at 308, 309."

It has continuously been the position of the City that *Holt I* should be given *res judicata* and collateral estoppel effect in this case since *Holt I* found "no violation of any Fifteenth Amendment rights was worked by the annexation." This Court considered this question without deciding it in *Allen v. Board of Elections*, 393 U.S. 544, at 556 note 20.[7]

The Court below was considering the same voting changes resulting from the same annexation on the same facts which had been found to be completely free of any Fifteenth Amendment violation.

Whether the substantive question arises under Section 5 or the Fifteenth Amendment, it is the same—whether the purpose and effect of the change is to deny or abridge voting rights on the basis of race or color. In the instant case, the change in black voting strength was not an abridgement or denial but incidential to achieving different, legitimate governmental goals attainable only through annexation. Such an expansion should not be unlawful, whether it brings in more whites or more blacks.

Perkins v. Matthews, 400 U.S. 379, 389, held that Section 5 was designed to cover changes having a "potential for racial discrimination in voting." This is a plain holding that such changes are covered. It does not answer the substantive question of whether the change was for the purpose of abridging the right to vote. If it

[7]"20. Appellees argue that §5 only conferred a new "remedy" on the Attorney General of the United States. They argue that it gave citizens no new "rights," rather it merely gave the Attorney General a more effective means of enforcing the guarantees of the Fifteenth Amendment. It is unnecessary to reach the question of whether the Act creates new "rights" or merely gives plaintiffs seeking to enforce existing rights new "remedies." However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigant."

did so imply, virtually every change in city land areas by annexation would be discouraged, if not effectively inhibited. It is difficult to conceive of any system, standard, practice or procedure which could not be thus challenged as discriminatory.

An annexation by the City of any surrounding territory would, in fact, dilute the black vote in the City. This was recognized by the court in the initial proceeding in *Holt I*, 334 F.Supp. at 234. An increase of voters resulting from a legitimate annexation cannot be considered "substantive discrimination." *Allen v. State Board of Elections*, 393 U.S. 544, 559. Unless the racial composition of the annexed area approximates that of the City, annexation inevitably will reduce the voting potential of one of the races.

What, then, are the factors which should be considered by the Attorney General and the Court in determining whether invalid discrimination has resulted?

The Act itself provides some general guidelines. It suggests that both "the purpose" and "the effect" of the annexation must be considered. But these are relevant only with respect to situations where the right to vote on account of race is "denied or abridged". These terms - "denying" and "abridging" connote discriminatory action. Merely changing the number of people entitled to vote does not constitute a denial or abridgement unless this is both the purpose and the effect. There must be a finding of racial discrimination. The test should be whether the predominant purpose is racial and discriminatory. This may be determined from the history of annexation in the particular city and state, from a study of the need for and purposes of the annexation, and from all other relevant facts.

The governing principle is that, where such dilution is an inevitable, incidential and collateral consequence of legislative or judicial action not addressed to voting, and is supported by substantial, legitimate governmental considerations, the dilution is not an effect of a changed voting procedure. It is, rather, a product of other, legitimate governmental action.

The purpose of the Act is not to prevent orderly growth of cities. Here, Richmond would have acquired an overwhelming majority of white voters in whatever direction it might annex (as with the Henrico County attempt at annexation).

While the "change" here involved may be "covered" by Section 5, if *Allen* and *Perkins* are construed so as to prohibit this annexation, then every change must be so prohibited. *Allen* and *Perkins* should not be so applied. Thus since this voting change resulted from a legitimate governmental action, annexation, diluting but not abridging or denying the vote of black citizens, the change was covered by the Act, but should not be prohibited.

III.

THE DISTRICT COURT HAS MISCONSTRUED AND REWRITTEN SECTION 5 OF THE VOTING RIGHTS ACT BY PLACING AN "EXTRA BURDEN" UPON THE CITY BECAUSE OF ALLEGED IMPERMISSIBLE PURPOSE IN THE ANNEXATION.

The District Court, adopting the Master's findings, found that the annexation by Richmond of part of

Chesterfield County was accomplished for an impermissible purpose—the dilution of black voting strength in the City. The Court further held that, therefore "an extra burden rests on that city to purge itself of discriminatory taint as well as to show that the annexation will not have the prohibited effect." (J.S. App. B., p. 20).

Further, the District Court held that:

> "To convince a court that such a city, by adoption of a ward plan, has purged itself of a discriminatory purpose in an annexation of new voters, it would have to be demonstrated by substantial evidence (1) that the ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation, and (2) that the city has some objectively verifiable, legitimate purpose for annexation." (J.S. App. B., p. 20).

The Court then held that the City had failed to present substantial evidence that "its original discriminatory purpose did not survive adoption of the ward plan" and, adopting the Master's conclusion, that the City " 'failed to establish any counterbalancing economic or administrative benefits of the annexation.' " (J.S. App. B., p. 20).

The requirement of such an "extra burden" constitutes an unwarranted rewriting and extension of the Voting Rights Act. Even so, the record herein establishes conclusively that the conditions set forth by the Court have been met by the City, and the Court's conclusions are thus without support in the record.

A. There Is No Requirement Of Any "Extra Burden" Because Of An Impermissible Purpose Contemplated By The Voting Rights Act, And No Suggestion That "Purpose And Effect" May Constitute Two Different Violations Requiring Different Burdens.

Nowhere in the Act, or in the cases interpreting that Act, does such a requirement as was imposed by the Court below, *i.e.*, an "extra burden" because of impermissible purpose, appear. In reading this requirement into the Act, the District Court, in spite of its protestations to the contrary, has, in effect, adopted the Master's contention that an impermissible purpose can never be cured, as suggested in Section IV-C, *infra*.

Further, nowhere in the Act, or the legislative history, is it even suggested that two distinct violations as to "purpose" or "effect" could occur, or that these terms are anything other than means to the same end. If a voting change has an impermissible purpose its implementation is prohibited. If a change has an impermissible effect its implementation is prohibited. If it has both impermissible purpose and effect, it is likewise prohibited. There is nothing in the Act to indicate that a different burden or standard is required for showing absence of either purpose or effect.

The legislative history, in fact, indicates that the intent of the Act is to the contrary. Prior to enactment of the Voting Rights Act of 1965, plaintiffs in cases brought under the Fifteenth Amendment were sometimes required to prove both racial purpose and racial effect to prove a violation. The requirement of proof of

such purpose was obviously difficult and often impossible. The Act not only placed the burden of proof on the jurisdiction seeking a voting change, but was designed to make clear that a showing of impermissible effect was enough for a violation of Section 5. Actually, the Act makes clear that a failure of proof on either item by the jurisdiction is sufficient. (*See*, Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1 st Sess., 507, 536 (1969)).

As with apportionment cases in which districts are badly malapportioned, the malapportionment may be due to normal population shifts, or to deliberate gerrymandering. The remedy is the same – a fairly drawn redistricting which meets constitutional requirements. *City of Petersburg v. United States, supra*, 354 F. Supp. at 1030-1031.

B. Any "Extra Burden" Required To Eliminate Dilution Of Black Voting Strength Would Necessitate Invalid Racial Gerrymandering In Itself.

As is demonstrated below, the City's 9-Ward Plan effectively eliminates any dilution of the black vote by guaranteeing black citizens 4 seats on the 9 member Council, corresponding to the ratio of black voting age population prior to annexation. Thus, in fact, an "extra burden" necessitates more than elimination of dilution to the maximum extent reasonably possible –

the standard of *Petersburg*, and, indeed, more than effective elimination of dilution. Thus, the test of the District Court would require the City to adopt a plan resulting in a black majority on the Council. In the present enlarged City, blacks constitute only 37.3% of the voting population and 42% of the population as a whole. The adoption of a plan resulting in a black majority would result in a reverse discrimination, a racial gerrymandering solely for that purpose, which, in itself, would be invalid under the Act. As the District Court itself said, (J.S. App. B., p. 4) the Voting Rights Act is designed to insure *equal* participation of all races in the electoral process. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308; *Allen v. State Board of Elections*, 393 U.S. 544, 556.

The Attorney General, charged with enforcement of the Act, and given equal status with the courts in passing upon voting changes, has taken the position that the black voters are not entitled to the "substantially disproportionate majority representation" that the Court below requires. (Memorandum for the Federal Appellees, p. 6).

The fact is, any dilution of black voting strength is effectively eliminated by the 9-Ward Plan.

IV.

THE CITY'S 9–WARD PLAN EFFECTIVELY ELIMINATES ANY DILUTION OF BLACK VOTING STRENGTH OCCASIONED BY THE EXPANSION OF THE OLD AT-LARGE VOTING SYSTEM.

A. The City's 9-Ward Plan Effectively Eliminates The Dilution in Black Voting Strength.

Assuming, arguendo, an impermissible purpose here, the ultimate and absolute effect of the City's voting changes, the expanded electorate modified by the 9-Ward Plan, is the elimination of any dilution of black voting strength caused by the expansion. The 9-Ward Plan (MCX 15, 18, J.A. 161, 162), guarantees 4 seats out of 9 to a black voting age population of 37.3%, and total black population of 42%.

Prior to the annexation, the Council was elected on an at-large basis. At that time, the black voters accounted for 44.8% of the voting age population. If bloc voting by race is assumed, the black population in that instance could not be assured of even one seat on the Council. The ratio of voting age population to the 9 Council seats was 4.03 seats. Annexation, expanding the electorate, reduced the black voting age population to 37.3% of the total.

The City's 9-Ward Plan, adopted for the purpose of minimizing this dilution to the extent reasonably possible, assures black citizens of Richmond 4 seats on the Council. By assuring 4 seats, corresponding to the

black voting age population *prior to annexation*, the dilution of black voting strength is totally eliminated. In fact, the black voting strength is actually enhanced over and above that prior to annexation, when black voters could not have been assured of any seats, given bloc voting by race. (While bloc voting by race is not as severe in Richmond as elsewhere, it must be assumed in all calculations, for if there were none, there would be no voting change. It is impossible to calculate otherwise. The City has, therefore, "assumed the worst" in its efforts to cure dilution. The less bloc voting that occurs, of course, the better. If there is none, there is no dilution, and the Act does not come into play.)

The 9-Ward Plan divides the City, including the annexed area, into 9 single member districts, or wards. The population norm for each ward is 27,715. The maximum over representation is 4.6%; the largest under representation is 5.0%. Total deviation is, therefore, 9.6%, insofar as the requirement of one-man, one-vote applies. This is well within the tolerance recently set out by the Supreme Court in *Mahan v. Howell*, 410 U.S. 315.

The Plan eliminates any dilution of black voting strength by guaranteeing 4 of 9 councilmen from wards which are black, reflecting the current population breakdown of the City, and, more important, conforming to the voting age population prior to annexation. A fifth seat is possible from Ward H (MCX 15, J.A. 161) depending upon the speed of projected future population movement.

No race has a constitutional right to elect one of its race, *Cherry v. New Hanover*, 489 F.2d 273, 274 (4th Cir. 1973), and

> "... [T]here is no principle which requires a minority racial or ethnic group to have any particular voting strength reflected in the [city] council. The principle is that such strength must not be purposely minimized on account of their race or ethnic origin."
> *Cousins v. City Council of Chicago*, 466 F.2d 830, 843 (7th Cir. 1972), *cert. denied*, 409 U.S. 893.

Nevertheless, here 4 seats are assured, placing black voters in a stronger position than prior to annexation. Any dilution is thus eliminated.

B. Voting Age Population Is The Proper Measure of Voting Strength.

Voting age population is the outside limit on the number of voters who can register and vote. It is the necessary measure of voting strength. *Zimmer v. McKeithen*, 467 F.2d 1381, 1384-1385 (5th Cir. 1972); *Moore v. Leflore County*, 361 F. Supp. 603, 607 (N.D. Miss. 1972).

The Court below characterized this position as superficial (J.S. App. B., p. 23). In fact, that Court's reasoning was superficial, holding that the black youngsters would grow up and simply translate into voting age population. This simply ignores the realities of black voting age population. As pointed out by the Attorney General, the census figures show that the

discrepancy between population and voting age population is not a mere happenstance. United States Census figures for 1950 and 1960 show that black voting age population (using age 18, as that is the present voting age) was 1.9% and 4.2%, respectively, lower than the black population percentage of total population. In 1970, of course, black voting age population was 7.2% lower than the black population percentage. It is an historical fact, and must be considered. *See,* HCX 24, Ex. 6 thereto, filed separately herein. See also, U.S. Censuses of Population and Houses: 1960, Census Tracts, Richmond, Virginia, Final Report PHC(1) - 126, Table 2, p. 22; U.S. Census of Population: 1950, Richmond, Virginia Census Tracts, Bulletin P-D45, Table 2, p. 11. *See also,* statement of the Attorney General before the Court below, Hearing of March 20, 1974, pp. 18, 19. If it is not, the reality of the situation will be ignored. Voting age population is the only significant element in defining the electorate. It is based upon undisputed census figures. Ignoring this factor ignores the fact that "legislators represent people, not percentages of people". *Graves v. Barnes,* 343 F. Supp. 704, 713, n. 5 (W.D. Tex. 1972), *aff'd and rev'd in part, sub. nom., White v. Regester,* 412 U.S. 755.

C. The *Petersburg* Decision is Controlling.

In a situation similar to this case, *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd,* 410 U.S. 962, the Court stated:

> "... [T]his annexation can be approved only on the condition that modifications calculated to neutralize *to the extent possible* any adverse affect upon the political participation of black voters are adopted, i.e., that the plaintiff [city] shift from an at-large to a ward system of electing its city councilmen." 354 F. Supp. at 1031 (emphasis added).

It was this standard which led the City to draft its Ward Plan, consult with the Department of Justice, accept the Department's changes, and amend the complaint herein.

The Court below has attempted to distinguish *Petersburg* by concluding that that decision was based upon a finding that the annexation therein did not have an impermissible purpose, and therefore, a different standard must apply to Richmond. That conclusion constitutes a rewritting by the Court below of the *Petersburg* decision. *Petersburg,* in this connection, held only that, notwithstanding an absence of impermissible purpose, an impermissible effect was prohibited by the Act. 354 F. Supp. at 1027. The District Court below has taken this finding and "stood it on its head" to conclude that the decision was based upon the absence of impermissible purpose. That is clearly erroneous.

As stated in Section III, *supra,* there are not two distinct violations, or elements of proof, under the Act, each requiring a separate remedy, or placing an "extra burden" on the City. To so conclude in effect adopts the Master's conclusion that impermissible purpose can never be cured; *i.e.,* if there were impermissible purpose, it is there and cannot be erased, so that any correction, no matter how complete or equitable, is precluded. If "purpose" requires a rescission of the governmental action, here the annexation, there can

never be a correction. This conclusion of the Court below subverts the Act and its purpose, and flies squarely in the face of *Petersburg*.

D. The Purpose Of The 9-Ward Plan Was To Minimize Dilution Of Black Voting Strength To The Greatest Extent Possible.

The District Court below held that discriminatory purpose was involved in the adoption of the 9-Ward Plan, (J.S. App. B., p. 23) and that the Plan was not designed to neutralize to the extent possible the dilution of black voting power. This holding is seemingly based not only upon the refusal to consider voting age population, but upon the finding that Dallas H. Oslin, Senior City Planner who drew up the plans, did not consider racial factors. (J.S. App. B., p. 28).

It is true that Oslin stated he did not consider racial factors, (MTR 216, 217) but there is absolutely nothing in the entire record indicating that Oslin meant anything other than that he had no invidious racial purpose.

It is simply not true that the City did not attempt to minimize the dilution caused by the expansion of the at-large system. The holding of the Court below shows a complete misreading of the record. Oslin is a technical expert who was asked to draw a ward plan for the purpose of minimizing the dilution of black voting strength.

The record clearly shows that immediately after the *Petersburg* decision the City was advised that a ward

plan should be submitted in accordance with that decision. Several plans were submitted to the United States, and the City asked the help of the United States in fashioning a ward plan which would minimize the dilution of black voting strength (Motion of the United States for Modification of Master's Report, p. 8). Suggestions were made by the Department of Justice, and adopted by the City, in an effort to minimize dilution, as directed by *Petersburg*, to meet the requirements of the Act.

In fact, the only reason the 9-Ward Plan exists is that it is a whole-hearted, good faith attempt to neutralize dilution, in accordance with *Petersburg*.

The holding of the Court below confuses the method of drawing a plan with the purpose of drawing a plan. The *method* used followed the recommendation of the Attorney General for "non-racially drawn councilmanic districts" (Ex. D to Complaint, J.A. 31). Oslin's mission, however, was to prepare a plan which minimized the dilution to the greatest extent possible. In conjunction with the United States, this was done. The only reason Oslin drew a plan at all was to minimize dilution. The only reason the City sought the help of the Department of Justice was to minimize dilution. The City did not, in the abstract, desire a ward plan. The only reason the plan was adopted was to minimize dilution. (J.A. 393, 399, MTR 90-93, 105-6, 112). The efforts of the City, with the help of the United States, were successful. The 9-Ward Plan not only "minimizes" the dilution caused by the expansion of the old at-large system, but it effectively eliminates it.

E. The City's Plan Not Only Eliminates Dilution, But Constitutes A Correct, Fairly-Drawn Ward Plan.

Dallas H. Oslin had, in 1971, drawn other plans for the *Holt I* case, but felt these were not adequate, and prepared an additional plan. (MTR 95, 300, J.A. 438, 443).[8] He did not use the census information on race until after the plans were initially drawn. The information used was census tracts and block statistics from the 1970 census. (MTR 215-16, 306, J.A. 434, 463).

Mechanically, Oslin, in drawing his last plan, began with the perimeter of the City, working toward the center, so that, when compromise was necessary in order to keep population near equal, the compromise took place in the center of the City. This was done to keep wards compact and prevent difficult, bad adjustments and odd shapes as far as possible. (MTR 322).

He used his background knowledge of the census data and of the people who live in each area. (J.A. 455). In addition, he studied the City, and used land use maps, air photographs, and in difficult areas, sought advice from a resident as to where to split the area. (MTR 221-22, 230).

[8]Though no racial data was used to draft the ward plan, Oslin well knew that the purpose was to minimize dilution of the black vote.

The City's 9-Ward Plan provides four black wards and four white wards, as follows:

Ward C	73.6%	black	Ward A	98%	white
Ward E	64.6%	black	Ward B	83.9%	white
Ward F	88.9%	black	Ward D	98.8%	white
Ward G	85.9%	black	Ward I	95%	white

Also, Ward H, now 59.1 percent white and 40.9 percent black, is the so-called swing ward. (MCX 18, J.A. 162).

Based upon the census statistics, in the old City, prior to annexation, the voting age population was 44.8 percent black and 55.2 percent non-black. (MTR 218-20, 306-16, 508-09).

The City Plan (MCX 15, 18, J.A. 161, 162) follows natural, geographical, physical and historical divisions of the City, the most notable being the James River, as the boundaries of the wards. These physical and historical boundaries will last through time, regardless of the composition of the population. (MTR 705).

Mr. Todd, the City's expert, developed the facts about the City included hereinabove in the background section. He has been employed by the City since 1947 as a planner. In his career there have been numerous times when his department has broken the City down into subunits or planning areas. To do this, he studied the needs of the people—their problems, their composition, their unique features—by subareas of the City. The planning department has traditionally used planning

districts or planning areas for which data is collected, and from which both neighborhood and district plans are made. Examples are the community renewal program and master planning urban renewal report. (MTR 328-29).

The basic criteria other than minimization of dilution used in drawing a ward plan, specifically a 9-ward plan, for the City of Richmond were:

(a) one-man, one-vote or equality of population to the greatest extent reasonably possible;

(b) a compact area within each ward, avoiding gerrymandering;

(c) to the greatest extent reasonably possible a strong community of interests within each ward; and

(d) consideration of physical boundaries. (MTR 334-35).

The black voting-age population of Richmond was 44.8 percent before the annexation and 37.3 percent after annexation. The ward plan submitted to the District Court below by the City and the United States Attorney General reflected accurately, to the greatest extent reasonably possible, the black-white ratio of voting age population, as it existed before annexation.

V.

THE DISTRICT COURT INTRODUCED ELEMENTS INTO THE CASE WHICH ARE NOT INCLUDED WITHIN THE PLAIN MEANING AND PURPOSE OF THE VOTING RIGHTS ACT, BY REQUIRING THE CITY TO ESTABLISH, AT TRIAL, ECONOMIC AND ADMINISTRATIVE BENEFITS FOR THE ANNEXATION.

A. The Annexation *Per Se* Was Not Before The Court For Decision.

The District Court below held that, in meeting the extra burden placed upon it, the City must show that it has some objectively verifiable legitimate purpose for the annexation (J.S. App. B, p. 20). That Court adopted the Master's conclusions that Appellant "failed to establish any counter-balancing economic or administrative benefits of the annexation." The findings of the Master, adopted by the Court, relate to the economics of de-annexation and the comparative financial benefits of administering the annexed area.

Such findings, and the underlying evidence, are irrelevant to the issue before the District Court - whether the voting changes caused by annexation, amended by the 9-Ward Plan, resulted in an impermissible dilution of the black voting strength in the City. This case concerns the voting changes occasioned by the

annexation. This is a question of constitutional rights, upon which economic and administrative issues have no bearing. *Watson v. Memphis*, 373 U.S. 526, 537-38.

This case is not concerned with the annexation itself. It is only the effect upon the voting system of Richmond which brings the Act into play. Indeed, in *Petersburg*, intervenors contended that the annexation *per se*, even with a shift to ward voting, could not be approved under the Act. That contention was refused. *Petersburg v. United States*, 354 F. Supp. 1021, 1029 (D.D.C. 1973), *aff'd* 410 U.S. 962.

Petersburg thus established that the annexation, insofar as it is a boundary change and not an expansion of an at-large voting system, is not the kind of discriminatory change which Congress sought to prevent. 354 F. Supp. at 1031.

It is the expansion of Richmond's at-large voting system, therefore, and not the annexation itself, which is the proper, and only, subject for consideration under the Act. Therefore, the City, pursuant to *Petersburg*, adopted its 9-Ward Plan to cure the dilutive effect on black voting which was caused by the expansion of the at-large voting system upon annexation.

The question was not whether the annexation was a good one, or a bad one, for the City of Richmond. A "good" annexation cannot make an impermissible change valid; a "bad" annexation cannot make a permissible change, which eliminates any dilution in black voting strength, invalid.

Further, the Attorney General is given status, equal to that of the Courts, to pass upon voting changes under Section 5. Any requirement that economic and administrative benefits of annexations must be considered by him will place an insurmountable burden upon the Department of Justice. The Attorney General, acting through the Voting Rights Section of the Department of Justice, is an expert, indeed the *only* expert, in the area of voting rights. If, in order to fulfill his statutory duties under Section 5, the Attorney General must now become an expert in annexations, and the governmental, economic and administrative aspects thereof, an impossible administrative burden will be placed upon him, one that was never contemplated by the Act.

B. Even If Relevant, The Economic And Administrative Benefits Of The Annexation Are Established Beyond Question By The Record Herein, Which Was Ignored By The District Court Below.

The City was not required by the Act to justify the annexation *per se* in the proceeding. The proper forum for that issue was the duly constituted Virginia Annexation Court which ordered the annexation. If there were no legitimate and proper justification for the

annexation, there would have been none. The annexation was accomplished by a three-judge Annexation Court pursuant to the laws of Virginia. The record of that proceeding, a part of the *Holt I* record, establishes beyond question the legitimate economic, governmental and administrative benefits of annexation. This voluminous record[9] was stipulated into the record herein for the very purpose of obviating the need for reintroducing the same evidence. The Court below, however, while focusing upon other parts of the record, totally ignored this great mass of evidence. Its finding that the City failed to prove these benefits is incomprehensible.

This Court may take judicial notice of the necessity for expansion confronting our nation's cities today. In Virginia, this expansion can only be accomplished by a special Annexation Court, pursuant to §15.1-1032 *et seq.*, Ch. 25, Code of Va., as amended, as was done here.

The statutory guide for annexation in Virginia has been the "necessity for and expediency of annexation." The judicial interpretation of this standard is discussed in detail by Professor Bain in C. Bain, *Annexation in Virginia,* 1966. The factors involved include, *inter alia,* the City's need for additional territory, the need for governmental services in the annexed area, and financial factors. The last mentioned factor includes gain or loss of revenue and taxation considerations, including whether the City can afford annexation. Bain, *supra,* at 104-136. All these factors were the subject of the extensive

[9]The annexation case took 9,095 pages of transcript, and involved 82 witnesses and 381 exhibits.

annexation hearing. That record was before the Court below. These are the very factors, with additional ones, which the Court below seemed to think had not been treated by the City.

In fact, these economic and administrative benefits of annexation have now been established before three different Courts. (The Annexation Court and the District Court and Court of Appeals in *Holt I*). The fact that the Annexation Court adopted the proposed compromise does not in any way negate that fact. That Court still had the duty to determine if the standards for annexation had been met. That Court found, and the District Court in *Holt I* adopted the finding, that "The evidence overwhelmingly convinces us of the necessity for and the expediency of some annexation." (J.A. 42; 334 F. Supp. at 234, n. 3).

The Three Judge District Court in Washington, D.C., with jurisdiction only under Section 5, may not usurp the function of a Virginia Court to retry the annexation, and, moreover, may not require additional economic and administrative factors to justify an annexation over and above those required by State laws. These factors are in the record and have been judicially established by a properly constituted Virginia Court, whose findings were affirmed by the Virginia Supreme Court of Appeals, 210 Va. 1i (1970), with certiorari having been denied by this Court. 397 U.S. 1038.

C. The Record Of The Hearing Below Does Not Support The Master's Findings, As Adopted By The District Court.

The District Court said in its opinion (J.S. App. B., p. 20):

"The master concluded that the 'City has failed to establish any counterbalancing economic or administrative benefits of the annexation' [footnote citing Master's Conclusion of Law, No. 17, J.S.App. C., p. 15]. The Master's conclusion was predicated upon findings of fact supported by direct testimony before him. The Master further found that the return of the annexed area to Chesterfield County would actually save the City at least $8.5 million of operating loss per year and $21.3 million of required capital outlay. [Master's Findings of Fact, No. 27, J.S.App. C., p. 11].*** Richmond did not offer any testimony before the Master to controvert these findings.*** The City cites from this [*Holt*] record an estimate that revenues from the annexed area for fiscal year 1971-72 exceeded appropriations from it by about $1.5 million.*** These evidentiary references to *Holt* were, of course, considered by the Master in making his findings. [Footnote reference to study by the Urban Institute]."

The Master obviously did not consider the evidence in the *Holt* record but relied entirely on the testimony of Melvin W. Burnett, (J.A. 527-530). This witness' testimony and his conclusion is patently specious.

Burnett referred to the annual financial report of the City Auditor which showed that the per capita cost of government in the entire city was $531.00. He estimated 50,000 people in the annexation area and arrived at $26.5 million as the "cost of governing the area." To this figure, he added for capital outlay "roughly, $3 million," and arrived at a total cost of government for the area of $29.5 million, from which

he deducted estimated revenues of $21 million. Thus, he arrived at a loss from the area of $8.5 million, which the Master adopted.

It is apparent on the face of it that allocation of per capita cost for the whole city to the increase in the population resulting from annexation is specious. The high class suburban area comprising most of the annexation area needs far fewer services than the central city. Furthermore, capital outlay is obviously not a part of the cost of government, except as already reflected in the Auditor's report in the form of debt service.

In addition to the direct evidence of the City Manager in the *Holt* case discussing the economic impact of annexation (HTR, 531-543, 546-551, and J.A. 387, 388, 390), and the obviously fallacious allocation of per capita costs, there are at least two other uncontradicted and indisputable items of evidence in the record which are irreconcilable with Burnett's conclusion and the Master's finding on this point.

First, City Exhibit #1 entitled "Census Tracts, Richmond, Virginia," Table P-4, in the hearing before the Master below, shows that the median family income for the ten census tracts that comprise the annexed area is $12,440; whereas, the median family income for the remaining portion of the City is $7,692. The exhibit shows that, in the 1970 census, reporting the year 1969, those with median family income under $20,000 amounted to 20.8% of the total in the old City, but only 5.5% in the annexed area. It needs no citation of authority to support the proposition that the higher the

level of income the less the requirement for municipal services. More affluent citizens need less welfare, less police, less recreation; on and on throughout the list of normal municipal services required by the old central City.

Secondly, Burnett by using per capita cost for the whole city allocated to the annexation area the exact percentage of expenditures that the people in the area bear to the total population of the city, approximately 18.86%; whereas, of approximately 6,500 city employees (exclusive of schools which comprise 22.5% of the city expenditures as shown by the Auditor's report) only 509 employees, or 7.83%, were used to serve the annexed area. (Uncontradicted testimony of the City Manager in *Holt I*, HTR 110-112). The greatest cost of government by far is personnel.

Hence, the evidence relied upon by the Master and by the District Court cannot pass muster when stacked against the direct testimony of the City Manager that the operations in the annexed area result in an economic benefit to the City.

This earlier testimony is further reinforced by a report published by The Urban Institute: "The Impact of Annexation on City Finances: A Case Study in Richmond, Virginia," Thomas Muller and Grace Dawson, The Urban Institute, May, 1973. The Urban Institute Study was done with the financial support of the Ford Foundation. The Study states, at p. iii, concerning the annexation:

> "As a result of this annexation, the population of Richmond grew by 19 percent and there was a 23 percent increase in Richmond's real property tax base.

> "Based on fiscal 1971 budgetary data, estimates are made of the annual revenue accruing to Richmond from the annexed area and annual expenditures incurred in providing public services to annexed area residents.
>
> "Results of the analysis indicate that annexed area residents contribute $337 per capita in local revenue to Richmond, and incur $239 per capita in expenditures. Thus, Richmond realizes an annual surplus of $4.6 million from the annexation. It is suggested by the authors that this surplus will continue in the future; however, it is noted that the continuation of an annexation surplus is largely dependent upon the level of school enrollment from the annexed area, since education is the major local government expenditure."

D. The District Court Below Has No Jurisdiction To Consider De-Annexation.

The District Court below exceeded its jurisdiction in considering Intervenor Holt's assertion that de-annexation of the territory is the proper remedy, and in considering evidence pertaining thereto. The jurisdiction of the District Court in the District of Columbia to hear and determine requests for declaratory judgments under Section 5 is limited by that section, which confers jurisdiction on that Court. The authority of that Court extends only to the declaration of whether the voting changes occasioned by the annexation, as amended by the 9-Ward Plan, have or do not have the

purpose and effect of denying or abridging the right to vote on account of race or color. *Beer v. United States*, 374 F. Supp. 357, 361-62 (D.D.C. 1974). In the instant case the proper issue under the Act was not what Richmond's boundaries should be, or whether the County could afford to take back the territory, but was whether the at-large voting system as expanded by annexation and then modified by the 9-Ward Plan of election, had a proscribed purpose or effect.

The Court below, however, did "not assent to any language in the *Beer I* opinion" which suggested that jurisdiction was so limited (with Judge Jones dissenting). (J.S. App. B, p. 33). The Court below then, relying on *Perkins v. Matthews*, suggested that Intervenor Holt return to a local three-judge United States District Court for appropriate remedy. While this Court may obviously remand to a lower Court with instructions to formulate a remedy, the District Court for the District of Columbia cannot, on the authority of *Perkins*, pass jurisdiction under the Act, much less jurisdiction which it has assumed but does not have, to another three-judge District Court in Virginia.

E. De-Annexation Is Not A Proper Remedy In Any Event, Since It Would Contravene The Reason And Purpose Of The Voting Rights Act.

De-annexation, pressed by Intervenor Holt, would only subvert the purpose of the Voting Rights Act. The Act

was designed and passed, as the legislative history shows, to banish racial discrimination in voting, in order to insure equal participation of minorities, especially blacks, in the electoral and governmental processes. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308; *Allen v. State Board of Elections*, 393 U.S. 544, 556. De-annexation here, however, would be retrogressive, returning the City to its pre-annexation posture: at-large voting, voting age population 44.8% black, 55.2% white. Any bloc voting by race, as found by the Court below, will be further aggravated by this case and de-annexation. In such a situation, black voters cannot be expected to elect even one representative to the Council. Therefore, black participation will be less than it is now, and obviously a great deal less than that assured by the 9-Ward Plan.

This result would be nothing less than a "punishment" of present and former officials, and the white citizens of Richmond. Nothing in the Act allows such a result. Not only that, it would also be a "punishment" of black citizens of the "old" City, a fact ignored by the Court below.

In *Petersburg*, the Court, after concluding that de-annexation was improper, stated:

> "We recognize that it is arguable that black citizens might be able to obtain even greater representation in old Petersburg if the annexation were prohibited." 354 F. Supp. at 1031.

The *Petersburg* Court nevertheless found in favor of the change to a ward system. In the instant case, the facts are even stronger. Black citizens will *not* obtain

greater representation if the annexation is prohibited. Black representation is enhanced by the City's 9-Ward Plan. It is not only error but it is folly to ignore the purposes of the Act by considering de-annexation.

VI.

THE DISTRICT COURT BELOW IMPROPERLY AND ERRONEOUSLY IGNORED THE ATTORNEY GENERAL'S APPROVAL OF THE CITY'S 9-WARD PLAN.

After the City brought suit seeking approval of its expanded at-large voting system, the *Petersburg* decision was affirmed by this Court. The City then, in order to meet the standard set out in *Petersburg*, drafted its original 9-Ward Plan (MCX 14, J.A. 160), and sought help from the Department of Justice in drawing a ward plan which eliminated dilution of black voting strength. The Attorney General approved the resulting 9-Ward Plan, (MCX 15, J.A. 161) and has supported it throughout these proceedings as having no racial purpose or effect.

The Court below, however, gave no weight to the Attorney General's interpretation. This was error. The Attorney General's interpretation of Section 5 is "entitled to deference." *City of Petersburg v. United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1972), *aff'd* 460 U.S. 962; *Perkins v. Matthews*, 400 U.S. 379, 390-391.

The Attorney General is, in fact, the only "expert" in this area recognized by the Act. The Act gives him equal responsibility for an initial decision upon voting changes. In exercising that responsibility, he will refrain from objecting to a voting change only if he is satisfied that "the proposed change does not have a racially discriminatory purpose or effect." *Georgia v. United States*, 411 U.S. 526, 537.

The Attorney General has approved the City's 9-Ward Plan at issue here. His interpretation is entitled to deference.

VII.

THE COURT BELOW MADE SUBSTANTIAL ERRORS OF FACT, WITHOUT SUPPORT IN THE RECORD, IN DETERMINING THAT RICHMOND HAD NOT COMPLIED WITH THE ACT. THE RECORD SHOWS THAT, IN FACT, RICHMOND HAS COMPLIED WITH THE ACT.

The Court below disregarded substantial evidence and made findings that are completely erroneous, which findings were used as the basis for portions of its opinion.

For example, the Court in its opinion states that the City assumed jurisdiction over the territory annexed on January 1, 1970, and thereafter conducted city council elections knowing that both were illegal. (J.S. App. B, p. 14.) This is a gross mischaracterization of the

evidence since no one, including the intervenors herein and even the Attorney General, understood the results of annexation to be covered by the Voting Rights Act. *Perkins v. Matthews*, 400 U.S. 379, decided one year after the annexation, was the first case to hold that the results of annexation were so covered.

The District Court in several instances states that the election was concededly illegal. The City has never conceded any such thing. At the time the election was conducted it was perfectly legal. Perhaps the District Court stated this fact as a concession since there is no evidence to support it.

Further, the Court states that the Master's finding, in which he found racial motivation in Richmond's negotiation and acceptance of the 1969 annexation settlement agreement, was unchallenged. In fact, the record shows that the City had won an annexation suit four years earlier against the County of Henrico which was refused because of the high cost, and in addition, both the *Holt I* record and the annexation case record are replete with evidence which showed the other concerns of the City and county for settling the case.

In this connection the District Court states (J.S. App. B, p. 13) that the City "expressed no interest in economic or geographic considerations such as tax revenues, vacant land, utilities or schools." The evidence of the City manager as well as several councilmen well demonstrates this not to be the case. (J.A. 386-392). This evidence from the *Holt I* record was simply ignored.

The Court indicated (J.S. App. B, p. 20) that the City failed to establish any kind of economic or

administrative benefits of annexation, thereby completely ignoring the evidence which had been stipulated into the record below from the *Holt I* record, as well as all evidence from the annexation court record. The Court also indicated that the annexed area was a financial burden on the City, again ignoring the evidence of the City manager (J.A. 388) as well as the independent study by the Urban Institute. It seemed to make no impression upon the District Court that the sole witness testifying that the annexed area was a financial burden to the City was a witness from Chesterfield County who testified for a self-serving purpose only; that is, return of the land.

The District Court said (J.S. App. B, p. 15) that it was a year after the Attorney General objected to the new voting system before the City filed this case. However, constant contact was maintained with the Attorney General to attempt to resolve the matter. In addition, as stated above, the City, as well as Intervenor Holt, thought that the Fourth Circuit Court of Appeals would end this matter in *Holt I* since the "gut issue" under the Voting Rights Act was included in the Fifteenth Amendment claim. The Attorney General also was aware of the City's position at this time, as it had filed *amicus* pleadings in that case.

Further, the District Court states (J.S. App. B, p. 15) that it was only after *Perkins* and after the Attorney General had informed Richmond that it was in violation, that the City made its "belated attempts" to comply with the Act. This is erroneous, and is a gross mischaracterization of the evidence in the record. Immediately after

Perkins, Appellant submitted its request to the Attorney General, who never informed Appellant of anything at all, *except in response to Appellant's requests*, which were made pursuant to its efforts to comply with Section 5. In short, Appellant was not prompted to action by the Attorney General, and there is no evidence in the record to support the statement of the District Court.

The Court below states (J.S. App. B, p. 19) that it did not agree that a showing that the City "has made some effort to remove the discriminatory effect of an annexation by adoption of a ward plan is sufficient to prove that it does not retain the annexed voters for a discriminatory purpose." This is a further misrepresentation of the record by the Court below. The evidence clearly shows that the City made many and exhaustive efforts to comply with the Act, beginning two weeks after the decision in *Perkins*, including seeking help from the Attorney General, which resulted in the joint ward plan presented to the Court.

The District Court has, it appears, selectively chosen portions of the total record that will support its conclusions. Certainly huge areas of the record, before the Master, and from *Holt I* and the annexation case, were completely ignored.

VIII.

CONCLUSION

For the reasons stated herein, it is repectfully submitted that the judgment of the Court below should be reversed, and that this Court remand this case to the Court below, with direction to grant the City's request for declaratory judgment to the effect that the expansion of the electorate caused by annexation, under an at-large system of elections, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; or, that the expansion of the electorate caused by the annexation, as modified by the 9-Ward Plan, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

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